

Zoning Bulletin

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Referendum—After city passes ordinance rezoning parcel so as to be consistent with general plan use designation, coalition submits referendum petition challenging ordinance

City argues that electorate's referendum power cannot be

Contributors

Corey E. Burnham-Howard

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used to reject ordinance because City's discretion to rezone is preempted by state statutory mandate that zoning be consistent with general plans

Citation: *City of Morgan Hill v. Bushey*, 12 Cal. App. 5th 34, 218 Cal. Rptr. 3d 276 (6th Dist. 2017).

CALIFORNIA (05/30/17)—This case addressed the issue of whether voters could validly utilize the power of referendum to reject a city's chosen method of making a parcel's zoning consistent with a general plan.

The Background/Facts: River Park Hospitality ("River Park") owned a vacant parcel in the City of Morgan Hill (the "City"). Prior to November 2014, the City's general plan provided a use designation for the parcel as "Industrial," and the parcel was zoned "ML-Light Industrial." In November 2014, the City amended its general plan to change the land use designation for the parcel to "Commercial." The parcel's zoning remained unchanged after the general plan amendment.

California Government Code § 65860 mandates that a parcel's zoning must be consistent with the municipality's general plan. In the meantime, § 65680 permits the maintenance of inconsistent zoning pending selection of a consistent zoning.

In April 2015, in an attempt to resolve the inconsistency between the 2014 "Commercial" land use designation for the parcel and its pre-2014 zoning of "ML-Light Industrial," the City Council approved Ordinance no. 2131 ("O-2131"). O-2131 would have changed the parcel's zoning from "ML-Light Industrial" to "CG-General Commercial."

The Morgan Hill Hotel Coalition (the "Coalition") submitted a timely referendum petition challenging O-2131. The "General Commercial" zoning designation for the parcel would have permitted a hotel, and the Coalition sought to prevent the development of a hotel on the parcel.

The referendum process allows voters to veto statutes and ordinances enacted by local officials before those laws become sufficient. Once a referendum petition challenging an ordinance is timely filed and certified to be sufficient, "the effective date of the ordinance shall be suspended and the legislative body shall reconsider the ordinance." (Cal. Elec. Code, § 9237.) "If the legislative body does not entirely repeal the ordinance against which the petition is filed, the legislative body shall submit the ordinance to the voters The ordinance shall not become effective until a majority of the voters voting on the ordinance vote in favor of it. If the legislative body repeals the ordinance or submits the ordinance to the voters, and a majority of the voters voting on the ordinance do not vote in favor of it, the ordinance shall not again be enacted by the legislative body for a period of one year after the date of its repeal by the legislative body or disapproval by the voters." (Cal. Elec. Code, § 9241.)

The City accepted a certification of sufficiency on the Coalition's referendum, but later "discontinue[d] processing" the referendum because the City contended that the referendum would "enact zoning that was inconsistent with" the City's general plan (i.e., by reverting the parcel's zoning back to

“ML-Light Industrial” when the parcel’s use designation was “Commercial.”) Later, still, the City called for a special election to submit the referendum to voters, yet then filed a legal action in court to have the referendum “nullified as legally invalid and removed from the ballot.”

Again, the City claimed that the referendum was invalid because, if the electorate rejected the O-2131, it would “create an inconsistency between the zoning for the parcel and the general plan’s land use designation for the parcel.” The City argued that the electorate’s referendum power could not be used to reject O-2131, because the City’s discretion with respect to the zoning of the parcel was preempted by § 65860’s mandate that the parcel’s zoning be consistent with City’s general plan.

The Superior Court granted the City’s mandate petition, removing from the ballot the Coalition’s referendum challenging O-2131. The court found that the City had established the “invalidity” of the referendum by showing that “the current zoning in question is inconsistent with the City’s General Plan—and therefore presumptively invalid.” The court ordered that the referendum be removed from the ballot and that O-2131 be certified “as duly adopted and effective immediately”

The Coalition appealed. The Coalition maintained that a referendum that seeks to prevent a zoning change from taking effect does not create an inconsistency with a general plan’s land use designation, but instead only maintains the “preexisting status quo.”

DECISION: Judgment of Superior Court reversed and matter remanded with directions.

The Court of Appeal, Sixth District, California, held that voters could validly utilize the power of referendum to reject a city’s ordinance that chooses the method of making a parcel’s zoning consistent with a general plan.

In so holding, the court agreed with the Coalition’s argument and rejected the City’s argument. Again, the City had argued that the electorate’s referendum power could not be used to reject O-2131 because the City’s discretion with respect to the zoning of the parcel was preempted by § 65860’s mandate that the parcel’s zoning be consistent with the City’s general plan. In rejecting that argument, the court emphasized that § 65860 did not require the City to adopt O-2131. Rather, said the court, § 65860 “preempted [the] City from enacting a new zoning that was inconsistent with the general plan, but it did not preclude [the] City from exercising its discretion to select one of a variety of zoning districts for the parcel that would be consistent with the general plan.” Accordingly, the court concluded that since the City retained that discretion, § 65860 did not preclude the electorate from exercising its referendum power to reject City’s choice of zoning district in O-2131. In other words, the court found that the electorate’s exercise of its referendum power to reject or approve the City’s attempt to select a consistent zoning for the parcel did not seek to enact anything but “simply continued that permitted maintenance of inconsistent zoning.” Since the City could have selected any of a number of consistent zoning districts to replace the parcel’s inconsistent zoning, § 65860 did not preclude the City or the electorate from rejecting the one selected by the City in O-2131.

See also: *Referendum Committee v. City of Hermosa Beach*, 184 Cal. App. 3d 152, 229 Cal. Rptr. 51 (2d Dist. 1986).

Case Note:

In its decision, the Court of Appeal, Sixth District, explicitly rejected the decision of the Court of Appeal, Fourth District, on the same issue. In deBottari v. City Council, 171 Cal. App. 3d 1204, 217 Cal. Rptr. 790 (4th Dist. 1985), the Fourth District had held that a similar referendum to the one faced by the Sixth District, "if successful, would enact a clearly invalid zoning ordinance." The Sixth District found this reasoning to be "flawed," noting that "a referendum cannot 'enact' an ordinance."

Freedom of Speech/Sexually-Oriented Businesses—City adopts amendments to adult establishment ban, setting new definition for “adult establishment”

Businesses challenge amendments as violating First Amendment free speech rights

Citation: *For the People Theatres of N.Y. Inc. v. City of New York*, 2017 WL 2427295 (N.Y. 2017)

NEW YORK (06/06/17)—This case addressed the issue of what is the burden of proof that a municipality must sustain in order to prevail at the third stage of a three-part burden-shifting framework for determining the First Amendment constitutionality of adult use zoning—when the overall test as to constitutionality of the zoning ordinance is intermediate scrutiny. The case also addressed the issue of whether a city met its burden of demonstrating that the establishments affected by its zoning amendments related to a ban on adult establishments retained a predominant focus on sexually explicit materials or activities such that the amendments did not violate First Amendment rights, or if there was no need for those amendments such that, on their face, they were a violation of free speech provisions of the U.S. and State Constitutions.

The Background/Facts: In 1995, the City of New York (the “City”) adopted a zoning ordinance (the “1995 Zoning Ordinance”) that barred adult establishments from residential zones and most commercial and manufacturing zones, and mandated that, where permitted, adult businesses had to be at least 500 feet from houses of worship, school, day care centers, and other adult businesses. Under the 1995 Zoning Ordinance, an “adult establishment” was defined as a commercial establishment a “substantial portion” of which was “an adult book store, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof.” In turn, an “adult book store” (a term meant to embrace stores selling or renting sexually explicit video material, as well as books and magazines) was defined as

having a “substantial portion” of its “stock-in-trade” in, among other things, printed matter or video representations depicting “specified sexual activities” or “specified anatomical areas,” as defined in the regulations. An “adult eating or drinking establishment” was defined as an eating or drinking establishment that excludes minors and “regularly features” live performances or films emphasizing “specified sexual activities” or “specified anatomical areas,” or where the employees regularly expose “specified anatomical areas” to patrons as part of their employment.

In 1998, the City developed a so-called “60/40” test to identify adult bookstores and adult eating and drinking establishments. Under the 60/40 rule, any commercial establishment with at least 40 percent of its customer-accessible floor/cellar area or stock-in-trade used for adult purposes qualified as an “adult establishment.”

Over time, the City found that adult establishments were achieving technical compliance with the 60/40 test by engaging in a “sham” of utilizing part of their premises for non-adult purposes without altering their predominant focus on sexually explicit activities or materials. In response, in 2001, the City adopted amendments to the 1995 Zoning Ordinance (the “2001 Amendments”). With respect to “adult eating or drinking establishments,” the 2001 Amendments provided that a business was an “adult establishment” if it regularly featured live performances characterized by an emphasis on certain “specified anatomical areas” or “specified sexual activities” in any portion of the establishment, regardless of whether it limited those performances to less than 40% of its floor area. In other words, a club featuring topless or nude dancers qualified as an “adult eating or drinking establishment” no matter the proportion of its space devoted to adult entertainment. With regard to adult bookstores, the 2001 Amendments formally kept the 60/40 test, with the added provision that if a store passed the test, but met at least one of eight criteria (e.g., like having viewing areas for adult movies or live performances), then the store’s non-adult material would not be considered stock-in-trade for the purpose of the “substantial portion” analysis.

In 2002, businesses that showed or sold adult films and businesses that had topless entertainment (collectively, the “Businesses”), but that technically met the 60/40 test, challenged that 2001 Amendments as being facially (i.e., on its face) unconstitutional, as a violation of First Amendment free speech rights. Their legal actions were consolidated.

In 2003, the trial court declared the 2001 Amendments unconstitutional and enjoined their enforcement. The Appellate Division reversed, declaring the 2001 Amendments constitutional. The Court of Appeals modified that decision and remitted the matter for further proceedings.

In its decision, the Court of Appeals reviewed the United States Supreme Court-provided three-part burden-shifting framework for determining the constitutionality of zoning that regulates adult establishments: First, a “municipality’s evidence must fairly support the municipality’s rationale for its ordinance.” Second, the municipality prevails “[i]f plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality’s evidence does not support its rationale or by furnishing evidence that disputes the municipality’s factual findings.” Third, “[i]f plaintiffs succeed in casting

doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." Notably, the Court of Appeals interpreted the test to mean that, with respect to the first stage, "a municipality's burden to prove that it has a substantial interest in regulating a particular adult activity is not a very heavy one." The court said that a local government implementing zoning that affects adult businesses must show there is a substantial governmental interest to justify restrictions on protected speech, but the government "retains discretion to make its findings from studies or other supportive information and to draw reasonable conclusions about which regulatory techniques will be most beneficial in addressing the findings."

The Court of Appeals found the City had met its burden to justify a rationale for the 2001 Amendments. However, it also found that the Businesses had furnished sufficient evidence disputing the City's factual findings. Thus the burden shifted back to the City "to supplement the record with evidence renewing support for its rationale" for the 2001 Amendments by showing that businesses technically meeting the 60/40 were not "so transformed in character that they no longer resemble the kinds of adult uses found . . . to create negative secondary effects." The court said that if the City was found to have "fairly supported its position on sham compliance—i.e., despite formal compliance with the 60/40 formula, these businesses display a predominant, ongoing focus on sexually explicit materials or activities, and thus their essential nature has not changed—the City [would] have satisfied its burden to justify strengthening the 1995 Ordinance by enacting the 2001 Amendments, and will be entitled to judgment in its favor." If not, the Businesses would prevail on their claim that the 2001 Amendments were "insufficiently narrow and therefore violated their free speech rights."

On remand, in 2010, the trial court upheld the 2001 Amendments. In 2011, the Appellate Division reversed, vacated the findings of constitutionality, and remanded. The Appellate Division directed the trial court to "specify the criteria by which it determined that the [Businesses'] essential nature was similar or dissimilar to the sexually explicit adult uses underlying the 1995 Zoning Ordinance." The Appellate Division instructed the trial court to use various characteristics of adult establishments to determine whether the Businesses retained a predominate focus on sexually explicit materials or activities, such as: the presence of large signs advertising adult content; a large quantity of peep booths featuring adult films; or the exclusion of minors from the premises.

Once again on remand, in 2012, the trial court struck down the 2001 Amendments as an "unconstitutional violation of the First Amendment." The trial court found the Businesses had all essentially divided their venues into two areas—adult and non-adult. The court thus concluded that the Businesses "no longer operate[d] in an atmosphere placing more dominance of sexual matters over nonsexual ones." Accordingly, the court found there was "no need for the 2001 Amendments," and that therefore, on their face, they were a violation of free speech provisions of the U.S. and State Constitutions.

In 2015, a divided Appellate Division affirmed the trial court's judgment. The City appealed. Because the Appellate Division's decision included a two-Justice dissent on question(s) of law in the City's favor, the Court of Appeals of New York had jurisdiction.

The Court's Decision: Judgment of Supreme Court, Appellate Division, reversed. Judgment for the City.

The Court of Appeals of New York held that the City had met its burden of demonstrating that the establishments affected by the 2001 Amendments retained a predominant focus on sexually explicit materials or activities. Thus, the court concluded that the 2001 Amendments did not violate the Businesses' First Amendment rights.

Importantly, in reaching its decision, the court also held that at the third stage of a three-part burden-shifting framework for First Amendment challenges to zoning adult businesses, the municipality has "only a modest burden." The court noted that the United States Supreme Court has instructed that in First Amendment cases applying intermediate scrutiny, a court's task, when reviewing a legislature's factual or predictive judgments, is "to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." The court said that same deferential standard is applicable "to a municipality's factual or predictive judgments in the adult use zoning context." More specifically, the court said that in the third-stage of the burden-shifting framework for determining the constitutionality of zoning that regulates adult establishments, the municipality need only show evidence that "fairly support[s]" the conclusion that there is an ongoing focus on the sexually explicit; the municipality "need not 'perform a formal study or a statistical analysis'"

Thus, the court said that, here, the City did not have to "establish that it ha[d] looked at a representative sample of 60/40 businesses in the city." In other words, the City, in demonstrating an ongoing focus on the sexually explicit, had to meet the same evidentiary burden at the third stage of the framework as it had to meet at the first stage. The trial court's task, said the Court of Appeals, was "to decide whether the City had relevant evidence reasonably adequate to support its conclusion that the adult establishments retained a predominant, ongoing focus on sexually explicit activities or materials."

Here, the court found that the City met its burden of showing continued focus on sexually explicit activities and materials by the Businesses. For example, the court found that evidence showed that stores that stocked non-adult magazines in the front of the store but still contained peep booths in the back of the store were "no less sexual in [their] fundamental focus." Similarly, topless clubs that had small signs and an adjoining comedy club, still retained a "predominate sexual focus."

Having found that the adult establishments continued to have a predominant focus on sexually explicit materials and activities, despite technically meeting the 60/40 rule, the court concluded that the 2001 Amendments were facially constitutional.

See also: *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670, 30 Media L. Rep. (BNA) 1769 (2002).

Case Note:

The Businesses had also challenged the 2001 Amendments as being unconstitutional

“as applied” to them. The as-applied challenge was not raised on a prior appeal and so could not be reviewed by the Court of Appeals.

Constitutionality of Zoning Enforcement/Equal Protection— Town denies property owner’s application for an extension of a permit allowing mobile home to remain on property after permanent home is destroyed by fire

Property owner challenges permit denial and zoning enforcement as a violation of constitutional equal protection rights

Citation: *Komondy v. Gioco*, 2017 WL 2290148 (D. Conn. 2017)

CONNECTICUT (05/25/17)—This case addressed the issue of whether a town violated a property owner’s equal protection rights under a “class of one theory” in denying the property owner’s application for an extension of a permit allowing her to remain on her property in a mobile home after her permanent home was destroyed by a fire.

The Background/Facts: Marguerite and Christopher Komondy lived in a historic home on property they owned in the Town of Chester (the “Town”). On March 5, 2005, their home was destroyed by fire, with damage so extensive that the structure had to be demolished. Subsequently, Mrs. Komondy obtained a permit from the Town to remain on her property in a temporary mobile home for six months while a permanent home was reconstructed. Upon expiration of the permit, Mrs. Komondy applied for an extension, which was denied by the Town’s Zoning Enforcement Officer (the “ZEO”). Section 113B.5 of the Town’s Zoning Regulation explicitly related to the placement of “a temporary dwelling on premises . . . during construction of [the] owner’s permanent dwelling” on that site. That section provided that “such mobile home shall not remain upon said premises for more than six months from the time that it is first placed thereon.” The Town also denied Mrs. Komondy’s application for a variance.

Mrs. Komondy’s appealed the denials, and her appeals were ultimately dismissed in court. The court found no “proof of exceptional difficulty or unusual hardship” to warrant a variance.

In July 2006, after the mobile home remained on the Komondy’s property for more than sixteen months, the Town issued a Cease & Desist Order, direct-

ing removal of the mobile home. The Komondys did not remove the mobile home, nor did they begin any reconstruction of a permanent home on their property. Eventually, the Town sued, and received a court judgment allowing Town removal of the mobile home. In February 2012, the Town notified Mrs. Komondy that the Town would be removing the mobile home at her expense, if it was not removed by her.

Mrs. Komondy then sued the Town. While the lawsuit was pending, Mrs. Komondy died, and her husband, Christopher (hereinafter "Komondy") was substituted as the plaintiff in the action. Among other things, Komondy brought a "class of one" equal protection claim. He alleged that his right to "equal protection" as a "class of one" was violated by the Town's enforcement of its zoning regulations against him.

The United States Supreme Court has recognized the existence of a "class of one" equal protection cause of action, pursuant to 42 U.S.C. § 1983, against a municipality for arbitrary or irrational application of property laws. "Successful equal protection claims [may be] brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."

Here, Komondy alleged that other, similarly situated property owners of residential land in the Town were permitted to maintain mobile homes on the land for "many years," and that the Town's unequal treatment of Komondy "deprived [him] of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution as enforced through Sections 1983 and 1988 of Title 42 of the United States Code."

The Town filed a Motion for Summary Judgment, asserting that there was no genuine dispute of material fact, and asking the court to find the Town entitled to summary judgment on the class of one equal protection claim as a matter of law.

DECISION: Town's Motion for Summary Judgment granted.

The United States District Court, District of Connecticut, held that Komondy's class of one equal protection claim failed as a matter of law because: Komondy failed to show that he was treated differently than any similarly situated individual; and the Town had a rational basis for denying Komondy's application for a permit extension or variance.

Komondy had pointed to three property owners that he alleged were "similarly situated" comparators who had mobile homes on their properties for longer periods than the Komondys. The court, however, found that none of the alleged comparators were similarly situated to Komondy. Two of the properties had mobile homes on them before the Town zoning regulations were instituted, and so the mobile homes were grandfathered and did not need to conform to the zoning regulations. Additionally, each of those mobile homes later became a permanent structure after permitted additions were added to them. Komondy's mobile home was not grandfathered and was never converted into a permanent structure. The third property that Komondy cited as a comparator was issued a Cease & Desist Order similar to Komondy for the mobile home. However, unlike Komondy, the owners of that property ap-

plied within two days of that order for a building permit for a permanent home and subsequently built that permanent home and removed the mobile home.

The court also found that Komondy failed to demonstrate that the town lacked a rational basis to issue the Cease & Desist Order. The Town simply enforced zoning regulations that limited temporary mobile home placement on property during permanent dwelling construction to six months.

Accordingly, the court concluded that “[n]o reasonable jury could conclude that the differential treatment alleged was the product of irrationality or that any of [Komondy’s] alleged comparators were sufficiently ‘similarly situated’ for purposes of application and enforcement of the law under the Equal Protection Clause.”

See also: *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060, 30 Env’tl. L. Rep. 20360 (2000).

See also: *Gray v. Town of Easton*, 115 F. Supp. 3d 312 (D. Conn. 2015), judgment *aff’d*, 669 Fed. Appx. 4 (2d Cir. 2016).

Case Note:

Komondy had also sued Town officials, individually. The court said that “[i]n order to bring a successful § 1983 claim against an individual in his individual capacity, the plaintiff ‘must show by a preponderance of the evidence that the defendant was personally involved—that is, he directly participated—in the alleged constitutional deprivations.’ ” The court found that Komondy’s claims failed to provide evidence that the Town officials were “personally involved” in the alleged equal protection violation. Further, the court found that the Town officials were entitled to qualified immunity.

Zoning News from Around the Nation

MASSACHUSETTS

Senate Bill 81, now pending in the state Legislature, would, among other things: “[r]equire towns to allow dense, multi-family, market rate development as of right;” “[c]reate a program of certifying communities that will encourage towns to establish policies to create more ‘workforce housing,’ economic growth, green development, and the like;” “[p]rovide benefits to ‘certified communities,’ including preferential consideration when providing State discretionary funds for infrastructure maintenance and development;” “[r]equire towns to create master plans, to update them on a regular basis, and to coordinate them with neighboring towns and regional planning agencies;” “[c]reate a new class of subsidized housing for middle-income residents;” “[r]equire towns to allow accessory apartments in single family homes;” [a]llow the incorporation of transferable development rights into zoning by-laws;” [s]implify the zoning variance and special permit processes;” “[m]ake the pro-

cess for adopting zoning changes less demanding;” “[o]pen towns up to law suits for zoning by-laws that do not meet certain state guidelines for housing development.”

Source: *Wicked Local Hingham*; <http://hingham.wickedlocal.com>

OHIO

State legislators are considering House Bill 175, known as the “Barnyard Bill,” which would “allow the state to oversee the zoning of small livestock, taking the power away from local zoning.”

Source: *WFMJ*; <http://www.wfmj.com>

OREGON

Pending in the state legislature, House Bill 2007 “would require city or county governments to complete a review of an application for a development with affordable housing within 100 days.” It would also “preempt residential downzoning in cities . . . and the banning [of] accessory dwelling units or duplexes in neighborhoods zoned for single-family homes.”

Source: *The Atlantic: CityLab*; www.citylab.com

RHODE ISLAND

The state Legislature is considering House Bill 6172, which would “create secondary agriculture operations” such as “the display of antique vehicles and equipment, retail sales, tours, classes, petting, feeding and viewing of animals, hay rides, crop mazes, festivals, weddings and other special events.” The bill allows for municipal zoning regulations of secondary agriculture operations, but not their prohibition.

Source: *Jamestown Press*; www.jamestownpress.com

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Procedure/Interim Zoning—County passes interim zoning ordinance placing a moratorium on marijuana production

Landowner argues adoption of interim zoning ordinance was not supported by a required emergency

Contributors

Corey E. Burnham-Howard

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Citation: *Peyote Canyon, LLC v. County of Benton*, 2017 WL 3189719 (Wash. Ct. App. Div. 3 2017)

WASHINGTON (07/27/17)—This case addressed the issue of whether interim zoning under Washington’s Planning and Enabling Act requires an emergency measure. It also addressed whether a specific interim zoning ordinance, which declared a moratorium on marijuana production in a county zoning district, was sufficiently supported by findings of fact supporting an emergency.

The Background/Facts: After Washington voters approved Initiative Measure No. 502, legalizing recreational marijuana use, the Board of Commissioners (the “Board”) in Benton County (the “County”) adopted a policy allowing marijuana to be grown in certain zoning districts of the County, including “rural lands 5 (RL-5).” Jerry Van Zuyen (“Van Zuyen”) owned land in an RL-5 zone (the “Property”) through his business Peyote Canyon, LLC (“Peyote Canyon”). Van Zuyen applied for a “tier 3 marijuana producer license” for production at that Property in the RL-5 zone. While his license application was pending, he began modifying a pole building at his Property (originally permitted as a residential garage) and erecting an eight-foot high fence.

After complaints from area residents, in May 2015, the County sent Peyote Canyon a notice that it had violated the County Code by not obtaining a building permit for the fence or a change of use permit for modifications to the pole building. Thereafter, Peyote Canyon submitted building permit applications for those structures. The County responded by identifying additional items that needed to be addressed before the permits could issue.

While the County was corresponding with Van Zuyen d/b/a Peyote Canyon with regard to the building permits, the County was also fielding concerns from area residents about “the incompatibility of a marijuana production operation with existing uses in the RL-5 zone.” On May 12, 2015, without prior notice, the Board considered and unanimously passed Resolution 2015-357, adopting an emergency ordinance, Ordinance 561. The resolution described Ordinance 561 as “an immediate emergency interim zoning amendment to prohibit the production of marijuana in the [RL-5] District.” “The resolution set a date for a public hearing, established a termination date for the interim zoning amendment, declared an emergency, and temporarily amended a prior ordinance and county code provision.” In addition to making findings, the ordinance recited the county’s decision that “it is appropriate to prevent additional marijuana growing operations in the RL[-]5 District that allegedly are incompatible with surrounding uses during the period of time necessary for the County to consider permanent zoning amendments.”

On June 2, 2015, the Board conducted the required public hearing on

Ordinance 561. On June 12, 2015, Van Zuyen d/b/a Peyote Canyon submitted the final items required to support his building permits. On June 16, 2015, the Board denied Peyote Canyon a building permit for the pole building remodel. In denying the permit, the Board cited Ordinance 561 and said that since the building permit application was incomplete at the time the ordinance was adopted, the building permit application had not vested. Also on June 16, 2015, the Board adopted Ordinance 562, continuing Ordinance 561. In October 2015, the Board adopted Ordinance 565, permanently prohibiting marijuana production in the RL-5 zone.

Peyote Canyon appealed the denial of the building permit. The Mid-Columbia Building Appeals Commission affirmed the denial. Van Zuyen d/b/a Peyote Canyon then filed an action in court, appealing the permit denial and asking the court to declare that the Board had not sufficiently identified facts constituting an emergency in support of Ordinance 561.

In response, the County argued that the finding of an emergency was not required. The County conducts its planning under Washington's Planning Enabling Act (the "Act"). Under the Act, RCW 36.70.790 provides that a Board that intends to conduct studies in a reasonable time, or hold a hearing for the purpose of, the adoption of any zoning map or amendment, may adopt "as an emergency measure a temporary interim zoning map the purpose of which shall be to so classify or regulate uses and related matters as constitute the emergency." The County argued that since "Ordinance 561 ha[d] nothing to do with a zoning map . . . RCW 36.70.790 [did] not apply," and instead RCW 36.70.795 and RCW 36.70A.390, which expressly applied to the adoption of an "interim zoning ordinance" applied.

Van Zuyen and the County both moved for partial summary judgment, asking the court to find there were no material issues of fact in dispute and to decide the matter in their favor on the law alone. The trial court agreed with the County's argument, and granted the County's motion. The trial court dismissed Peyote Canyon's claim, affirming the building permit denial.

Van Zuyen d/b/a Peyote Canyon appealed. On appeal, Van Zuyen again contended that Ordinance 561 was insufficiently supported by findings of fact supporting an emergency. The County again asserted that the finding of an emergency was not required. The County further argued that, in any case, if an emergency was required to justify interim zoning, the Board had sufficiently identified facts constituting an emergency to justify Ordinance 561.

DECISION: Judgment of trial court affirmed.

The Court of Appeals of Washington, Division 3, held that interim zoning under the Act, such as with Ordinance 561's moratorium on

marijuana production, does require an emergency measure. The court further held that, in enacting Ordinance 561, the Board had sufficiently identified facts constituting the emergency required to justify the interim zoning.

Again, the County had argued that since “Ordinance 561 ha[d] nothing to do with a zoning map,” RCW 36.70.790 did not apply. Again, RCW 36.70.790 provides that a Board may adopt “as an emergency measure a temporary interim zoning map the purpose of which shall be to so classify or regulate uses and related matters as constitute the emergency.” In rejecting the County’s argument, the court explained that the term “[m]ap” was used in the Act as both a noun and as a verb. “Map,” used as a verb, refers to the process of zoning property, said the court. “A county may ‘progressively and separately’ bring property within the county under the control of zoning by ‘officially map[ping]’ it,” said the court. “Under the Act, there can be no zoning measure or change without adopting or amending a zoning map at the same time,” said the court. Citing case law and the purpose of the Act, the court concluded that “[i]nterim zoning under the Act continues to require an emergency measure.”

The court also found that the Board had sufficiently identified facts constituting the emergency required to justify the interim zoning Ordinance 561 in that: (1) there was a “judicially-noticeable fact that without a moratorium, applicants for marijuana production licenses could submit building permits for production facilities in the RL-5 zone, thereby frustrating the effectiveness of any effort to prohibit such production as incompatible with other property uses;” and (2) there were several reasons why the Board wanted to investigate further whether marijuana production would be incompatible with other property uses, including identified concerns raised by the public that marijuana production in the RL-5 district “could conceivably prove incompatible with other uses.”

See also: *Matson v. Clark County Bd. of Com’rs*, 79 Wash. App. 641, 904 P.2d 317 (Div. 2 1995).

Fair Housing/Discrimination—City ordinance requires 600-foot spacing between “family care residences”

Disabled individual argues ordinance violates the federal Fair Housing Act

Citation: *A.D. by Valencia v. City of Springfield*, 2017 WL 3288110 (C.D. Ill. 2017)

ILLINOIS (08/02/17)—This case addressed the issue of whether a city zoning ordinance that required a 600-foot spacing of a “family care residence” from the property line of any other such facility violated the federal Fair Housing Act’s prohibition on discrimination based on handicap. It also addressed whether a city’s refusal to grant a conditional permitted use to a family care residence violated the Fair Housing Act’s reasonable accommodation provision.

The Background/Facts: The owners of a one-story ranch house on Noble Avenue in the City of Springfield (the “City”) (the “Noble home”) renovated the home to make it fully accessible to mobility-impaired residents. In March 2014, Individual Advocacy Group, Inc. (“IAG”) arranged for housing for three of its clients at the Noble home, including its client, “A.D.” A.D. was a 62-year old adult who was developmentally disabled and handicapped.

At some time, it was discovered that the Noble home was located within 600 feet of an existing group home, in violation of the City’s Zoning Code (the “Code”). The Code prohibited “family care residences” from being located in a residence district unless located upon a zoning lot that is more than 600 feet from the property line of any other such facility. The Code defined a “family care residence” as: “[a] single dwelling unit occupied on a relatively permanent basis in a family-like environment by a group of no more than six unrelated persons with disabilities, plus paid professional support staff provided by a sponsoring agency, either living with the residents on a 24-hour basis or present whenever residents with disabilities are present at the dwelling.” The Code further provided that any family care residence not in compliance with the 600-foot spacing requirement “may be eligible” for a conditional permitted use (“CPU”) provided that the residence would not have: “any adverse impact upon residents of nearby facilities;” and “any detrimental affect [sic] upon existing privacy, light or environment of surrounding residences.”

IAG applied for a CPU to allow the Property owners and IAG to operate the family care residence at the Noble home. The CPU included a request for a reasonable accommodation to the City's rules. IAG argued that, since the Noble home operated in all respects like a single-family home and less than five people resided in the home, the Noble home should be treated as a "family" under the Code and should not be required to seek zoning approval through a CPU. The Code defined a "family" as: "One or more persons each related to one another by blood, marriage, or adoption, or is a group of not more than five persons not all so related occupying a single dwelling unit which is not a boarding-house or lodging house as defined in this section." In any case, IAG argued that the City should grant it a CPU because the Noble home met all CPU criteria and had not adversely affected the surrounding community.

The City Council denied IAG's CPU based on the fact that the Noble home did not meet the family care residence 600-foot spacing rule.

IAG and A.D., through his next friend and legal guardian, Mary B. Valencia, (collectively, the "Plaintiffs") sued the City. Among other things, they alleged that the City Code's 600-foot spacing requirement for family care residences was discriminatory in violation of the federal Fair Housing Amendment Act of 1988 ("FHA"), 42 U.S.C.A. §§ 3601-3631. "Discriminatory action under the FHA may be shown in three ways: (1) by proof of discriminatory intent; (2) by evidence showing that a defendant's actions had a disparate impact on the select group; or (3) by showing that a defendant failed to make a reasonable accommodation." Here, the Plaintiffs alleged discrimination based on disparate treatment and reasonable accommodation theories. Specifically, they alleged that the rule violated the FHA's prohibition on discrimination based on handicap. They also alleged that the City's denial of the CPU violated the FHA's reasonable accommodation provision.

The Plaintiffs sought injunctive relief to avoid eviction of A.D. and the other residents of the Noble home while the case was pending.

DECISION: Plaintiffs' motion for preliminary injunction granted.

The United States District Court, C.D. Illinois, held that the Plaintiffs were entitled to their request for preliminary injunction because they had demonstrated "a likelihood of success on the merits" and that they would "suffer irreparable harm in the absence of preliminary relief," and that an injunction was "in the public interest."

In so holding, the court first concluded that the Plaintiffs had established a likelihood of success on the merits of showing that the City Code's 600-foot spacing requirement for family care residences was invalid under the FHA. The court said this was because the

Plaintiffs had shown that: the spacing rule was not adopted out of concern for the disabled; and the spacing rule placed restriction on where disabled residents could live.

The court explained the relevant law: Under the FHA, it is unlawful to “discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap” of a person who intends to reside in the dwelling. (42 U.S.C.A. § 3604(f)(1).) Under the FHA, it is also unlawful to “discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap” of any person who intends to reside in the dwelling after it is made available. (42 U.S.C.A. § 3604(f)(2).) Of particular relevance here, courts have found that the FHA “appl[ies] to municipal zoning ordinances that would restrict the placement of group homes.” Specifically, Illinois federal district courts have found that: “[t]he FHA is violated when ‘different standards apply to group homes than to families and other groups living together;’ ” and the provisions of alleged discriminatory ordinances “cannot survive unless they are warranted by the specific needs and abilities of those handicapped persons to whom they apply.”

Here, the Plaintiffs alleged that the Code’s spacing rule, on its face, applied only to residences for the disabled and imposed a condition on those residences that was not imposed on similar residences for persons without disabilities. The court agreed. The court found that the language of the Code would allow “five unrelated college students” to live together in a residential area without being subject to any conditions, while prohibiting such an equal opportunity for disabled adults. The court also concluded that, in adopting the spacing rule, it was not the interests of the disabled that were considered, but rather was an attempt to protect residential environments from the adverse effects of homes for the disabled.

The court also concluded that the Plaintiffs had established a likelihood of success on the merits of showing that the City’s refusal to grant the Plaintiff’s CPU application violated the FHA’s reasonable accommodation provision. The court explained that the FHA also requires “a public entity to reasonably accommodate a disabled person by making changes in rules, policies, practices or services as is necessary to provide that person with access to housing that is equal to that of those who are not disabled.” The court noted that an accommodation is required under the FHA if it “(1) is reasonable, and (2) necessary, (3) to afford a handicapped person the equal opportunity to use and enjoy a dwelling.”

Here, the court found that the City failed to ever specifically address or evaluate the Plaintiff’s request for a reasonable accommodation

through a CPU. The City had denied the CPU “simply because the home was not in compliance with the spacing rule.” Since that was the sole reason for denial, the court concluded “the City could not have complied with the FHA’s reasonable accommodation provision, which requires it to make changes in order to provide a disabled individual housing equal to those who are not disabled.”

See also: *Wisconsin Community Services, Inc. v. City of Milwaukee*, 465 F.3d 737, 749-50, 18 A.D. Cas. (BNA) 918 (7th Cir. 2006).

See also: *U.S. v. City of Chicago Heights*, 161 F. Supp. 2d 819 (N.D. Ill. 2001).

Variance—Applicant argues special circumstance of property warrants area variance to operate pawn shop

Competing pawn shop owner argues any special circumstances were created by applicant selecting the particular property for such a use

Citation: *Pawn 1st, LLC v. City of Phoenix*, 2017 WL 3428093 (Ariz. 2017)

ARIZONA (08/10/17)—This case addressed the issue of the standards a municipal zoning board applies in considering an application for a zoning variance. More specifically, it addressed the issue of whether a variance applicant’s selection of property, with the knowledge that an area variance is required for an intended use allowed on similarly zoned properties, itself constitutes a self-imposed special circumstance precluding an area variance.

The Background/Facts: In January 2010, William Jachimek, doing business as Central Pawn, (“Jachimek”) leased property (the “Property”) in a “Commercial C-3 District—General Commercial” in the City of Phoenix (the “City”). Jachimek entered the lease with the intention of operating a pawn shop at the Property. A pawn shop was a permitted use in the C-3 zoning district so long as the building housing the pawn shop was located at least 500 feet from a residential district and a use permit was obtained from the zoning administrator. Jachimek applied for a use permit for his pawn business. Because the Property was within 500 feet of a residential district, he also applied for a variance from the 500-foot residential setback requirement.

An area variance, such as that sought by Jachimek, relieves the duty to comply with a zoning ordinance’s technical requirements, such as

setback line, frontage requirements, and lot size restrictions. Under Arizona statutory law and the City's zoning ordinance, an area variance may be granted where there are "special circumstances" or "hardship" such that strict application of the zoning ordinance would "deprive the property of privileges enjoyed by other property of the same classification in the same zoning district." (A.R.S. § 9-462.06(G)(2); City of Phoenix Zoning Ordinance § 307(9)(a)-(d).) However, a finding of special circumstance does not justify a variance when the circumstances are self-imposed by the applicant or property owner. (A.R.S. § 9-462.06(H)(2); City of Phoenix Zoning Ordinance §§ 303(B)(2)(b), 307(A)(9)(a)-(b), -(10)(b).)

The City's Zoning Administrator denied Jachimek's applications.

Jachimek then appealed to the City's Board of Adjustment (the "Board"). The Board conditionally approved Jachimek's requested variance. In doing so, the Board found that "special circumstances" applied to the Property that were "not created by the owner or applicant, but rather were created in part by growth in the city itself." Specifically, the Board found that prior eminent domain activities had rendered the Property "dissimilar to other properties in a reasonably close radius," including setbacks, lot size, and parking restrictions.

A competing pawn shop, Pawn 1st, LLC ("Pawn"), filed a special action in superior court challenging the Board's variance decision. Ultimately, the superior court ruled in Jachimek's favor and dismissed Pawn's complaint. The court found that sufficient evidence supported the Board's decision to grant Jachimek's area variance.

Pawn appealed, and the court of appeals reversed. The court of appeals held that any special circumstances "were created by Jachimek and/or the Property owner by selecting this particular property to use as a pawn shop, in violation of the prohibition against self-imposition."

Jachimek appealed.

DECISION: Judgment of Court of Appeals vacated. Judgment of Superior Court affirmed.

Disagreeing with the court of appeals finding that the special circumstances here were self-imposed by Jachimek's decision to pursue a pawn shop use at the Property, the Supreme Court of Arizona upheld the Board's grant of a variance to Jachimek.

In so concluding, the court first found that "[t]he record support[ed] the Board's findings that the lot size, the building's limited setback from the public sidewalk, and the parking restrictions constitute[d] special circumstances justifying an area variance." The court found this was because "the Property's unique characteristics create exceptional practical difficulties." "Th[ose] characteristics and the strict application of the zoning regulations uniquely diminish[ed] the Property's

commercial viability as compared to 'other property of the same classification in the same zoning district,' ” found the court. Importantly, in disagreement with the court of appeals, the court also found that those special circumstances “arose from factors beyond Jachimek’s control.” It was the City’s eminent domain action, not Jachimek’s intended use, that altered the Property’s dimensions and created the special circumstances, found the court.

In so finding, the court emphasized that “Arizona zoning statutes and local ordinances require boards of adjustment to consider special circumstances applicable to the *property*, not the *property owner*.” Here, noted the court, Jachimek’s proposed use was permissible and the area variance would not alter the character of the neighborhood. Accordingly, the court held that “an applicant or owner’s selection of a property, even with knowledge that an area variance is required for an intended use allowed on other similarly zoned properties, does not itself constitute a self-imposed special circumstance precluding an area variance.”

See also: *Rivera v. City of Phoenix*, 186 Ariz. 600, 925 P.2d 741 (Ct. App. Div. 1 1996) (*denying area variance where owner created the special circumstance*).

Zoning News from Around the Nation

MICHIGAN

The state Legislature is considering Senate Bill 329 and House Bill 4503, which would amend the Michigan Zoning Enabling Act. The bills would prohibit municipalities from: defining a property renting for less than 28 days as a commercial use; and restricting short-term rentals in residential districts. In other words, the proposed legislation would prohibit municipalities from banning short-term rentals in a community.

Source: *Petoskey News-Review*; www.petoskeynews.com

NEW HAMPSHIRE

Governor Chris Sununu has vetoed House Bill 86, which would have set statewide standards for votes on zoning variances. “Current law requires variances meet a five[-]point test, including whether the project serves the public interest. Some cities and towns hold separate votes on each requirement, others don’t. House bill 86 would have mandated discrete votes on all five criteria.” The state Legislature could override

the veto in the fall with two-thirds support in both the state House of Representatives and Senate.

Source: *New Hampshire Public Radio*; <http://nhpr.org>

OHIO

The Oregon City Council has approved a resolution that imposes “a six-month moratorium on the granting of permits or certificates of occupancy for any building, structure, use or change of use that would enable the retail sale of medical marijuana in order to allow council and the planning commission to review applicable Ohio statutes, criminal codes and the city zoning code.” Ohio’s Department of Commerce is overseeing the rules and regulations related to medical marijuana, and those rules are reportedly to be finalized in September 2017, with the market for medical marijuana to be operational by September 2018.

Source: *The Press*; www.presspublications.com

TEXAS

The state House Committee on Land and Resource Management is considering House Bill 188, which would “allow a homeowner to build or remodel under the rules in place when they bought the property for seven years.”

Source: *KXAN*; <http://kxan.com>

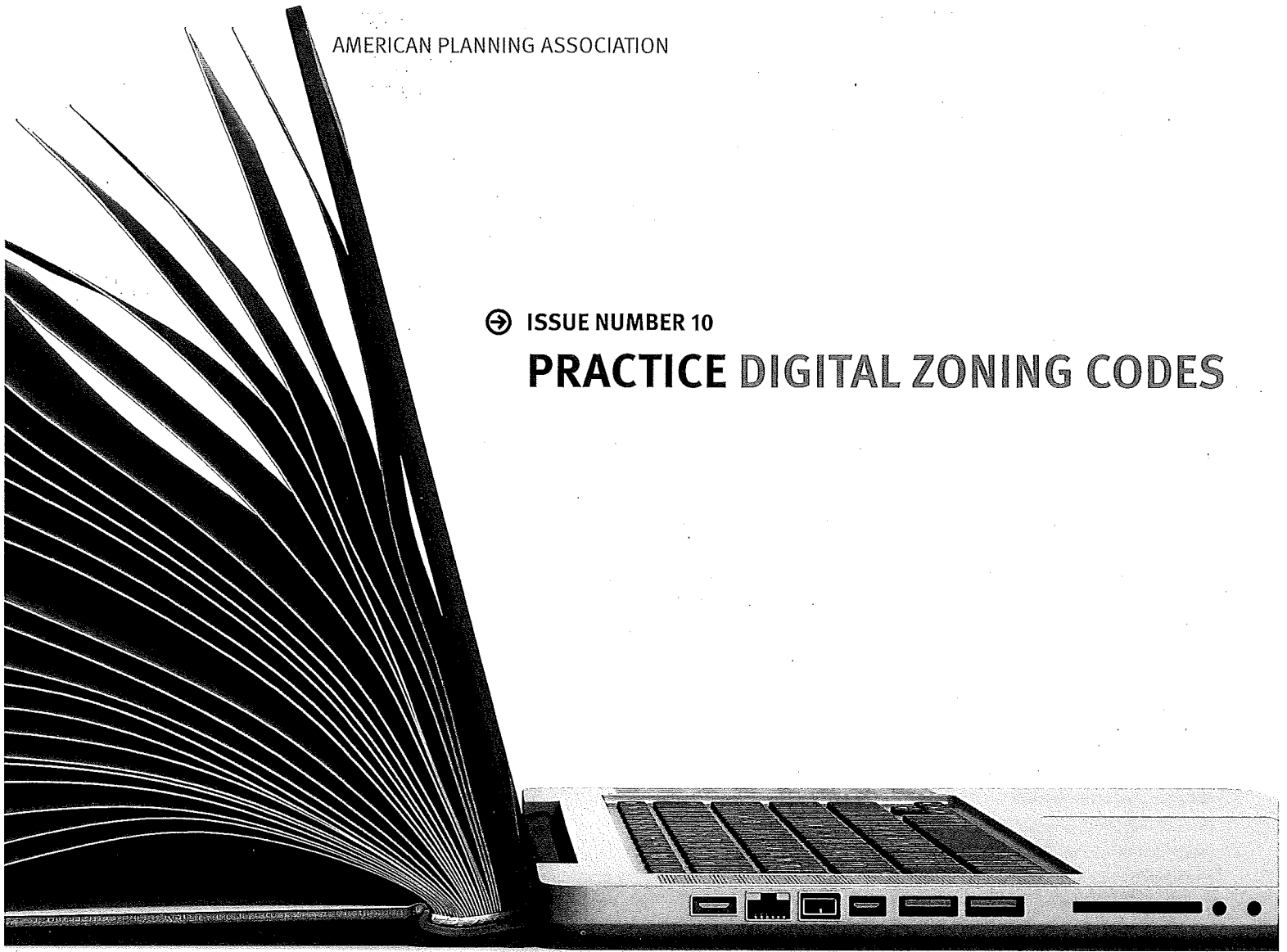
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PRACTICE DIGITAL ZONING CODES



10

Digital Zoning Codes and Comprehensive Plans

By Peter Sullivan, AICP

The printed page is not extinct, but electronic publishing is becoming a standard format for the digital age. From page-flipping online documents to custom-built websites, there are dozens of applications and services that can create a modern digital document. But which tools are best for publishing long, highly structured documents, like zoning codes and comprehensive plans?

This article surveys options for publishing modern, interactive documents in a feature-rich, web-ready format. It identifies eight popular digital publishing methods and summarizes key trade-offs among the various approaches. The article also describes how to evaluate which method is best suited to meet the needs of those working in a public-sector agency and recommends project management strategies for deploying, testing, and maintaining new software and online work products. The conclusion identifies a basic set of prerequisites for digital publishing.

WHY DIGITAL PUBLISHING?

In an era of 140-character tweets and round-the-clock media, urban planners are challenged to deliver complex information in a clear and engaging manner. So what are planning agencies doing to address this challenge? In 2016, Urban Insight collected data from more than 600 U.S. local government planning agencies about various technology-related topics, such as digital publishing, social media, online permitting, and web-based geographic information systems (GIS). It published its findings earlier this year in *City Planning Department Technology Benchmarking Survey*.

With respect to digital publishing, this report identifies a gold standard based on ease of use, information retrieval, and compliance with popular computing devices and software. The standard includes an HTML format, mobile responsive design, and full search capabilities.

The data shows that the usability of online zoning codes is mixed, with only

one-third of planning agencies meeting the gold standard. Among the group that did meet the gold standard, there were multiple methods for producing these documents. These approaches include a mix of self-publishing and third-party services.

Some well-known third-party options include codification services, provided by firms such as Code Publishing Company, Municipal Code Corporation, Coded Systems, General Code, and American Legal, in addition to digital publishing. While there are a variety of reasons for utilizing these services, this article focuses on self-publishing tools.

One of the goals of this article is to ensure that authors are aware that the choices for digital publishing are not limited to either publishing a static PDF on a website or fully outsourcing document hosting to a third-party vendor. Several of the in-house publishing methods presented in this article are affordable, user-friendly, and feature-rich, and exceed the Urban Insight gold standard.

The Urban Insight report also evaluated digital publication of comprehensive plans, which is another type of planning agency publication that benefits from enhanced digital features but also raises a number of management issues due to document length and complexity. In comparison to online zoning codes, comprehensive plans are skewed even further away from the gold standard, and there are greater instances in which the document is not available online in any format.

As a document, comprehensive plans follow a less hierarchical structure and are more likely to be produced with flexible layout software like Microsoft Publisher or Adobe InDesign. In contrast, zoning codes are traditionally prepared in a word processor, which maintains hierarchical structure and automates the text updates (e.g. multilevel lists, cross-references, and tables of contents). While creative design

does provide greater visual interest for the reader, the downside of a custom layout is that it can be more difficult to revise and maintain, especially if it is reliant on advanced software that incorporates objects, paths, layers, and other advanced page layout features.

Authors should also consider that a document finely tuned for the printed page will not necessarily provide the same look and function on a screen. Fortunately, there are self-publishing methods that efficiently balance this print-versus-web dilemma.

DIGITAL PUBLISHING METHODS

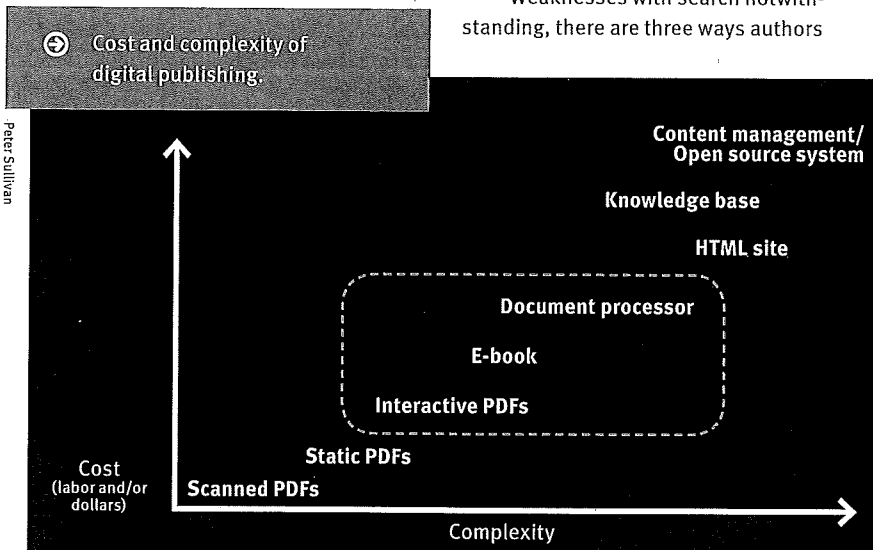
The term “digital zoning code” or “digital comprehensive plan” implies the presence of certain navigational features and document behaviors beyond static text and images displayed on a screen. These features and behaviors become available (or can be enabled) through a combination of specific file formats, authoring workflows, and end-user settings. For the efficient publication of digital zoning codes and comprehensive plans, this article recommends digital publishing methods that include, at a minimum, the following basic characteristics:

- Internal and external hyperlinks
- Web-based navigation features and customizable display options
- A table of contents and intuitive headings
- A combination of authoring, editing, and publishing capabilities
- A reasonable learning curve and intuitive workflow
- Robust customer support or technical documentation

There are countless software applications and services capable of organizing and publishing content on a webpage, from simple text editors like Windows Notepad, to integrated site design, development, and publishing applications like Adobe Dreamweaver.

But authors should be selective when choosing a digital publishing method because documents like zoning codes and comprehensive plans demand a certain amount of formatting automation to achieve a reasonable level of publishing efficiency. The methods described below are well suited to this publishing task, presented in increasing order of complexity and customization.

The methods highlighted in the middle of the chart in the graphic below are at the point in the cost and complexity spectrum, where all the digital publishing characteristics become available. The decision then is whether additional publishing sophistication is worth the extra cost (for staff time), and whether this service will be performed in-house or by a third-party vendor.



Scanned PDFs

Creating PDFs by scanning printed documents is not recommended for three reasons. First, the scanning process often renders content completely unsearchable. Second, it is more difficult to create, manage, and use hyperlinks in a PDF generated from a scanned document versus a PDF generated from a word processor or other text editing software. Third, the author is unable to perform text edits within the PDF, a task that can be desirable based on an author's publishing workflow. Scanned PDFs appear to be phasing out, possibly due to the wider availability

of user-friendly publishing software that resolves the functional disadvantages of the scanning-to-PDF workflow. As a publishing method, scanned PDFs are identified in this article to mark the lowest end of the feature-availability spectrum.

Static PDFs

Static PDFs are widely used for in-house digital publishing. While the text in static PDFs is searchable, the results are sequential—meaning the author must step through search results across the document one at a time. This is less desirable in comparison to prioritized search (a listing of results based on relevance), which is offered through other recommended publishing described in this article.

Weaknesses with search notwithstanding, there are three ways authors

can manage PDF documents so that they comply with the basic digital publishing characteristics described above. First, static PDFs should not be broken into separate files linked from a webpage. This practice emerged as a workaround to circumvent the slow loading times caused by dial-up modems. Breaking up long documents into multiple PDFs does not allow for document-wide searches (even in the limited sense offered by static PDFs) and forces the reader to juggle between multiple files. Authors tempted to pursue this technique as a proxy for a table of contents are encouraged to

consider the second recommendation, which is to use PDF bookmarks. By adding bookmarks at appropriate sections and subsections, authors can generate a running table of contents within the document to help convey document structure and aid navigation. Third, PDFs *do* allow for the creation of internal and external hyperlinks. Although they are manually maintained, the use of hyperlinks can significantly enhance the performance of a PDF.

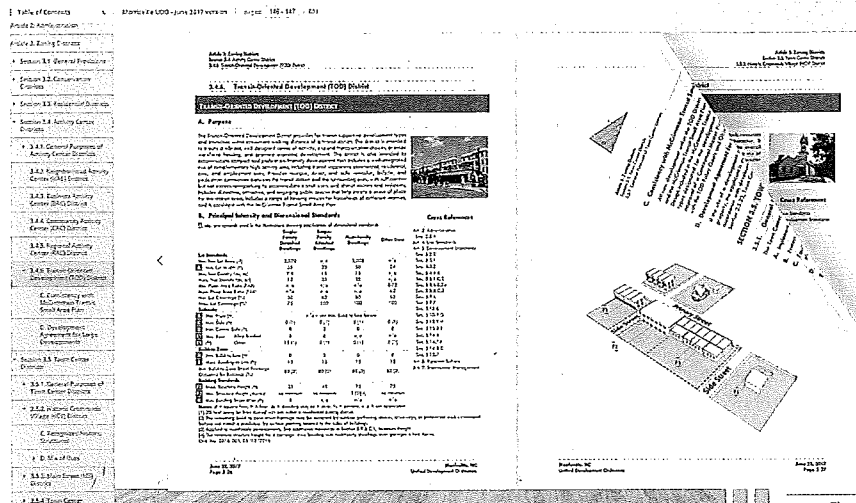
Interactive PDFs

Interactive PDFs are an enhanced version of a static PDF. They include the same search limitations; however, the document's appearance and navigation is greatly improved through the presence of a running header that includes buttons, which can activate features such as a table of contents, scroll zone, slide show, or video.

E-book

E-books include a page-flipping visual effect and offer a range of navigation features. The benefit of this method is that the software automates the published document's design and structure. The typical workflow is that an existing, static PDF is imported into the program, and then the author overlays design elements, layout controls, and navigation elements. E-books are relatively affordable and user-friendly "off-the-shelf" solutions; however, one downside is that the content does not live natively within the software. This means that authors can end up maintaining two versions: the source file (created with either a word processing or page layout program) and the e-book digital file.

Some popular e-book software applications convert a PDF file to a Shockwave Flash file to render the page-flipping effects. E-books should not be confused, however, with the EPUB file format, which is a technical standard published by the International Digital Publishing Forum. The EPUB file format can be read on devices like smartphones, tablets, computers, or e-readers such as iBooks and Google Books. It is typically used for novels and similar publications with limited layout requirements. Because layout, structure, and navigation control is more limited with EPUB,



An e-book of Morrisville, North Carolina's unified development code.

it is not recommended for publishing complex reference documents like zoning codes and comprehensive plans.

Cloud-Based, Software as a Service
 With the cloud-based, software-as-a-service (SaaS) method the software is licensed on a subscription basis and centrally hosted. Content resides natively within the software so that only one document version needs to be maintained (unless a separate printed document is desired). While a cloud-based, SaaS solution does provide greater automation, one downside is the author has less control over the publication's function and appearance. This is because the digital output and document structure is predetermined by the software's specifications.

Document Processor
 Document processors superficially resemble a word processor but incorporate a powerful workflow referred to as multi-channel publishing. In this single-source authoring method, the content is developed natively within the application, and then the author can instruct the program to generate output for the desired medium such as print (PDF), web (HTML), and other formats. In addition, document processors are template-driven and include conditional formatting capabilities. This means

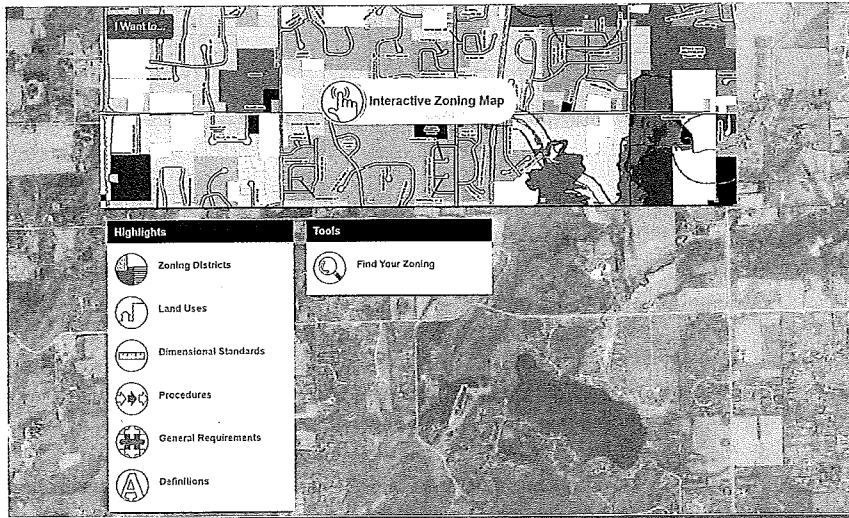
that elements specific to the printed page—like headers and footers—would only display on the PDF output, while digital elements like hover-over text and a tri-pane table of contents would only display on the HTML output.

Document processors are widely used in the technical authoring community, for example in creating user manuals and policy guides in multiple languages and output types. Another benefit is that they retain word-processor-like control of styles,

cross-references and multilevel lists, which significantly automate the text updating process. In the case of document processors, it is beneficial for authors to have a general understanding of how webpages are structured and styled. Document processors can simultaneously display multiple viewing environments (e.g., a what-you-see-is-what-you-get view and source code view) which gives authors the flexibility of generating webpage structure and style automatically or manually, through the direct editing of HTML and CSS (which can be a surprisingly efficient workflow).

HTML Editor
 An HTML editor offers significant design flexibility; however, efficiency is reduced in light of fewer word processing controls. In addition, it is difficult to generate print output, other than simply printing from a web browser (which does not translate formatting to print). HTML editors are perhaps more appropriate for comprehensive plans, as zoning codes tend to incorporate more complex numbering and referencing mechanisms and are revised more frequently.

Knowledge Base
 Possibly the next frontier of digital publishing, this method allows the user to query the document and receive customized



Village of Richfield, Wisconsin

The cloud-based version of Richfield, Wisconsin's zoning code.

DIGITAL PUBLISHING METHODS, SOFTWARE AND SERVICES

Below is a list of software applications and vendors that can implement the digital publishing methodologies described in this article. Software and technology evolve rapidly, and certain applications and services may be replaced or change names. When selecting software or services, first consider the methodology that aligns with the authoring goals and constraints described in the following section, and then research the applications and services that deliver this functionality.

| METHOD | EXAMPLES |
|---|---|
| Scanned PDF & Static PDF | Adobe Acrobat, PDF Studio, Libre Office |
| Interactive PDF | Adobe Acrobat, Adobe InDesign, Quark Express, Affinity Publisher (in development), Page Plus |
| Cloud-Based, Software as a Service (SaaS) | EnCode Plus, Zoning Hub, Open Counter |
| E-book and EPUB | FlippingBook (Page-flipping/Flash/HTML5), Issuu, Anyflip, Pub HTML5, Flip HTML5, Pageflip, Uberflip, Calibre (EPUB), Sigil, LaTeX, Genebook |
| Document Processor | MadCap Flare, Adobe Framemaker & Robohelp, Help & Manual |
| HTML Editor | Wordpress, Wix, Squarespace, Urban Interactive Studio, Civic Plus, Corel Web Site Creator, Adobe Muse & Dreamweaver, Google Web Designer |
| Knowledge Base | Tangerine Documents, Knowledge Owl, Quip, Bloomfire |

information. Instead of (or in addition to) the user navigating a long document, the content is contained in a database, with the author setting rules for how the information is returned. If knowledge bases gain wider use in the planning industry, it will be interesting to see how this impacts the way plans and codes are structured and administered.

SELECTING A DIGITAL PUBLISHING METHOD

Planning agencies should carefully consider how they will balance cost and complexity when selecting a digital publishing method and take into account factors like competing document management goals (e.g., features versus ease of use), operational context (e.g., large versus small department; number of amendments per year), and external constraints (e.g., budget; expertise; legal/IT considerations). Suggested evaluation criteria are provided below.

Long/Highly Structured Documents

Ensure that the solution is appropriate for long, complex documents. While it might be possible to efficiently generate a handful of pages using any web publishing method, consider that the layout and publishing tasks will be multiplied by dozens or hundreds of pages.

Existing Document Format

Is the document being written from scratch or converted from an existing file? Review the solution's importing capabilities to determine if it will accept existing file formats, and whether any pre-import formatting cleanup is needed.

Feature Comparison

As noted in the previous section, each publishing method has trade-offs, and it is important to understand the features and limitations of a given application or service. Beyond the baseline characteristics of modern digital documents identified in the previous section, there are a range of additional features that can further enhance a digital publication.

Authors should also understand whether a digital publishing service includes publication of the entire regulatory or policy document. This is particularly the case with the cloud-based, SaaS publishing method. Some digital publishing services may advertise a host of attractive online features, but in converting the existing zoning code or comprehensive plan, the service may only selectively repackage certain portions of the document for the final output (e.g., commonly referenced regulations like zoning district dimensional standards and allowed uses). If the published document—regardless

of features—depends on readers referring to a secondary document to access the full scope of applicable policies or regulations, an author should consider whether this represents an overall improvement in how relevant information is communicated.

Below are 20 useful features and document characteristics to consider when selecting a digital publication method.

- Source content control
- Table of contents
- Dynamic search
- Hyperlinks
- Responsive layout
- Styles and automatic numbering
- Cross-referencing
- Images
- Tables
- Autonomous server
- Templates
- Independent HTML and CSS
- GIS Integration
- Multichannel publishing
- Annotations
- Built-in calculators
- Support for all devices
- Video integration
- Tracked changes
- Hover-over and drop-down text

Time and Budget

Understand the agency's time and budget constraints, and pursue a methodology that will keep within these parameters.

Technical Capacity

A talented project manager may skillfully develop and maintain a digital publication, but what happens when that person leaves the organization? If an agency is considering a more complex digital publishing method, the agency should have the technical depth to maintain the document over the long term.

Frequency of Amendments

Frequency of amendments and turn-around time for revisions is often cited as a reason to opt for in-house control. The selection criteria are quite different for an agency performing frequent, substantial amendments to documents versus an agency whose documents undergo little or no change during a typical text amendment cycle.

Audience

Consider who will be using the digital publication and the desired level of sophistication. Do internal staff have specific feature requests? What level of technological sophistication does the community expect from its local government planning agency? It is also wise to consult the municipal attorney's office and IT department, and if possible, consult with the agency's executive team and elected officials.

LAUNCHING A DIGITAL PUBLISHING CAMPAIGN

A digital publishing campaign refers to the logistical and political considerations involved in generating support for, and becoming successful in, the significant task of publishing an online zoning code or comprehensive plan. In the public sector, deploying new software and converting a long, complex document can become a significant undertaking due to the number of stakeholders. It is important to ensure that sufficient support is in place to see the project to completion.

Get It on the Work Plan

Make sure that sufficient resources are committed to the task, including staff time,

departmental budget, and support from other departments. Understand the agency's budget cycle, and consider including the digital publishing proposal in the budget so that resources are formally committed.

Form a Strong Project Team

Digital publishing is not a one-person show. Enlist other staff in addition to the project manager to assist in areas such as reviewing draft work products, troubleshooting technical issues, or performing any time-intensive document preparation, formatting, or asset management. This includes ensuring image source files are properly cropped and sized and tables are appropriately structured. It is also wise to gain the support of a project champion such as a department head, city manager, or elected official.

Manage the Project and Provide Status Updates

Although a complex digital publishing task does take significant time, the author should establish a realistic scope, schedule, and budget to ensure the publishing effort stays on track. Careful up-front consideration of the major milestones—for example, creating a test output, completing an entire section, and completing a full review draft—will help identify the critical path to completion. In addition, the project manager should communicate progress (as well as any setbacks) and keep key stakeholders informed. Should it be necessary, project champions will be more willing to grant additional time for project completion or accept changes in scope when progress updates are regularly provided.

TESTING, EVALUATION, AND IMPLEMENTATION

This section summarizes the mechanics of deploying, testing, and maintaining new software and work products. Consider the following recommendations to ensure a smooth conversion effort and successful ongoing maintenance strategy.

The Project Manager Might Need to Work Late
A digital publishing effort may incorporate the use of new software and may involve the

conversion of dozens or hundreds of pages into a digital format. Successful project managers tend to be independent problem solvers who prepare for success and are willing to invest extra time to resolve unexpected technical glitches.

Download Free Trials and Seek Product Demonstrations

Pursue software applications and cloud-based services that offer free trials or product demonstrations. Free trials are an excellent opportunity to confirm that the software will perform as expected prior to making significant financial commitments. In addition, live product demos help establish rapport with vendor sales and technical teams who may be willing to tailor services to the agency's specific scope and budget and quickly help resolve future issues.

Invest in a Robust Maintenance Plan

Pursue software applications and cloud-based services that offer a guaranteed maintenance plan. These plans can take various forms; for example, some vendors will offer a fixed number of inquiries or updates that can be issued in a given time period. Another model is a pay-for-priority maintenance agreement allowing the customer to place an increasing number of service calls and receive higher priority in the customer service queue in exchange for additional maintenance fees. Project managers should investigate these packages and also explore the extent to which free software documentation is available online, either in the form of a help manual, knowledgebase, YouTube channel, or user forum.

Premium maintenance packages are well worth the investment. This is especially true when deploying new software or embarking on a major digital conversion, particularly within the first several years of maintaining a new digital publication.

While the agency's IT department may be supportive of the digital publishing effort, they may not have expertise with the specific software or service, meaning technical help from the vendor and internet community should be leveraged to the full extent possible.

Document Issues and Establish Written Protocols

Project managers should anticipate that issues will emerge during the conversion effort. They should be diligent about documenting technical issues and noting how they are resolved, as it can be easy to forget how arcane technical issues were resolved weeks or months prior. In addition, better documentation helps build capacity in the organization by ensuring knowledge transfer and allowing for contingency scenarios should the project manager be reassigned to other duties or leave the organization.

Maintaining Amendments

As part of a major digital conversion effort, the project manager should continually ask, "Can I (or another team member) intuitively and efficiently replicate the publishing workflow, and are the procedures sufficiently documented?" A negative answer could translate into inefficient or sloppy document maintenance, and slowly degrade the quality of the publication over the course of multiple amendments.

If a large number of amendments are expected, the agency may be nearing the stage in which a full-scale rewrite of the zoning code or comprehensive plan is needed. In this case, it may be best to delay the digital publishing effort until after the comprehensive rewrite is complete. Further, as planners consider the next major update to a zoning code or comprehensive plan, it is wise to consider in advance which digital publishing method will be pursued. This detail is often considered at the end of the updating process, but thinking through the format at the outset can save considerable time and money.

Following a major rewrite, a good practice is to schedule periodic regulatory or policy "cleanups," in which a package of miscellaneous edits to the zoning code or comprehensive plan is brought to the planning commission and city council for technical correction (which may include formatting corrections to the digital document).

While the omnibus clean-up approach does require a separate legislative process, it increases the likelihood that a sweeping set of minor text and formatting edits will be

supported because the changes are decoupled from other substantive (and perhaps controversial) regulatory or policy amendment proposals.

CONCLUSION

Given the sophisticated nature of modern digital publishing methods, some readers may wonder whether in-house publishing is achievable without dedicated website development or design staff. It is not necessary to know how to code to publish a modern digital publication, as many applications automate the generation of HTML and other programming languages.

Nevertheless, digital publishing is inherently technical in nature, and project managers should have a basic understanding of the following technical and publishing-related concepts:

- Formatting techniques specific to long, structured documents, for example tables of content, styles, headers and footers, cross-references, automatic numbering, and multilevel lists
- File formats, such as document files (DOCX, PDF, HTML) and image files (JPG, PNG)
- Basic image editing, such as cropping, resizing, and adjustments
- Graphic design principles, such as layout, hierarchy, font and color, and white space
- Fundamental website concepts, such as a server, domain, and File Transfer Protocol (FTP)
- General familiarity with markup and programming languages, such as HTML, CSS, and JavaScript

There are many free online tutorials that address these topics, as well as paid services with high-quality training libraries such as Lynda.com. Additionally, project team members less interested in technical details can still play a crucial role in the digital publishing process, either as an advisor, reviewer, or project champion. Team members should reflect on their skills and interests, and the team should thoughtfully assign roles. Like all urban planning projects, digital publishing is a team effort.

ABOUT THE AUTHOR

Peter Sullivan, AICP, is development coordination supervisor in the Development Services Center in Durham, North Carolina. He has produced digital publications as a planner in the public and private sector, emphasizing the balance of efficiency, quality, and ease of maintenance. Prior to joining Durham's City-County Planning Department, he was a consultant with Clarion Associates, where he specialized in zoning and land-use regulation. Sullivan is currently cochair of the Communications and Public Affairs Committee of the North Carolina Chapter of the American Planning Association and a regular contributor to Planetizen.com.

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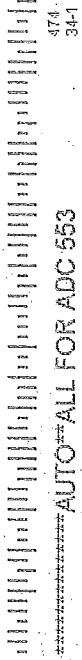
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